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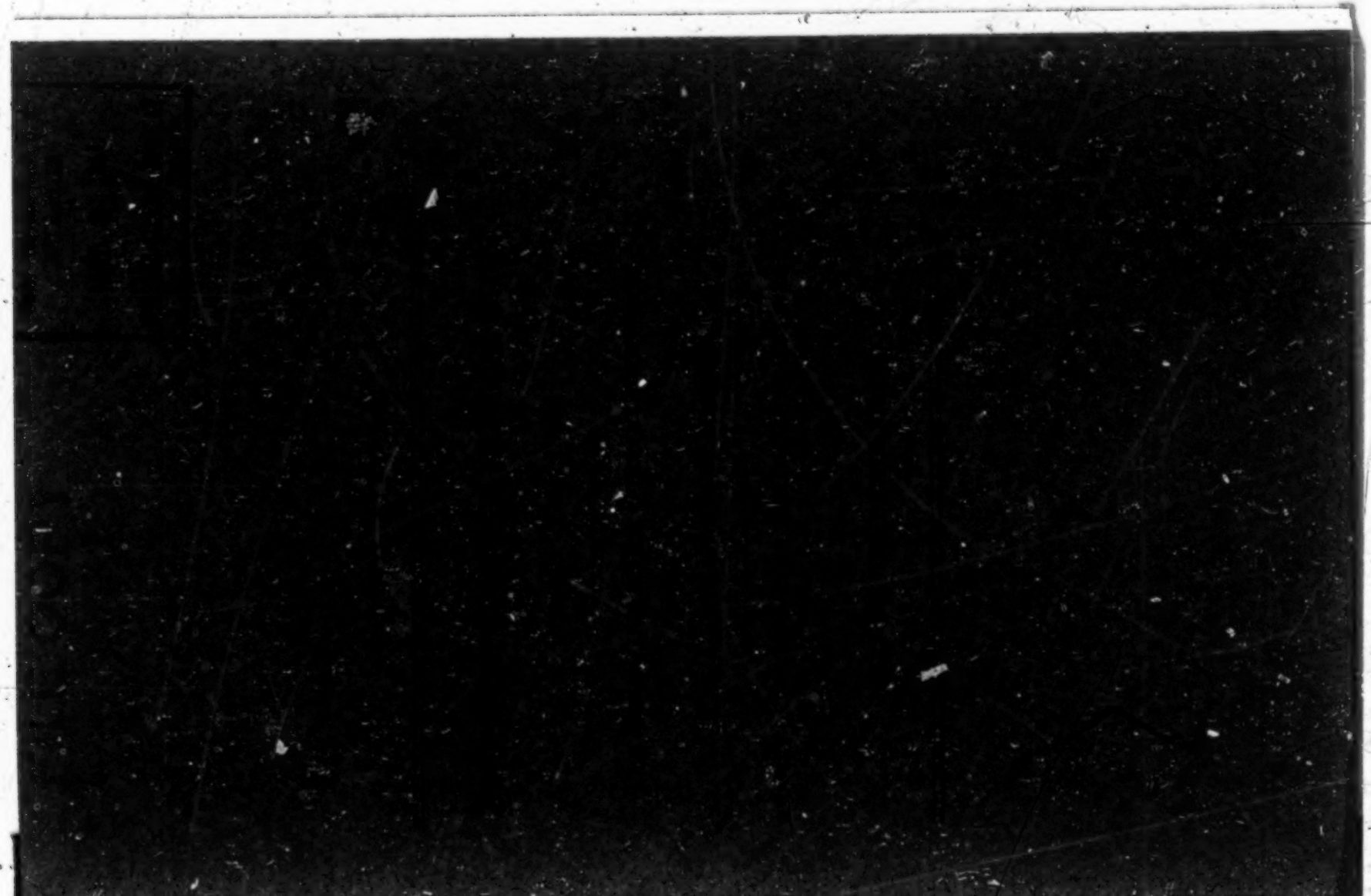

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 817

THE ROYAL INDEMNITY COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 12) is unreported. The opinion of the Circuit Court of Appeals (R. 17) is reported in 116 F. (2d) 247.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 26, 1940. (R. 20.) The petition for a writ of certiorari was filed on March 6, 1941 (R. 21), and granted on April 7, 1941. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a Collector of Internal Revenue has authority to discharge a surety bond filed with a claim in abatement when the liability of the taxpayer and surety has not been completely satisfied.

2. Whether the United States is entitled to interest on its claim against the surety.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra,* pp. 29–33.

STATEMENT

The pleadings (R. 2–7) and the stipulation of facts (R. 7–10C) disclose the following undisputed facts:

On March 15, 1920, the Commissioner of Internal Revenue assessed to the taxpayer, Walter Moore, additional income tax for the calendar year 1917 in the amount of $29,128.82. (R. 7.) On May 6, 1920, the Collector of Internal Revenue for the Second District of New York served notice and demand on the taxpayer for payment of the additional tax. Thereupon the taxpayer filed a claim in abatement, and on December 1, 1920, the taxpayer as principal and the petitioner as surety executed a bond to the Collector, and to his successor in office in the amount of $31,000 to secure payment of the tax, interest and any penalties. (R. 8, 10A.) On May 2, 1922, the taxpayer and

the surety, at the then Collector's request, executed a second similar bond in the sum of $38,000, which superseded the first bond. (R. 8, 10B.) Upon the filing of the bonds the Collector continued to suspend the collection of the additional assessment and interest while the Commissioner considered the claim for abatement. On February 18, 1925, the Commissioner allowed the claim in abatement to the extent of $20,906.15, and rejected the claim in the amount of $8,223.67, thereby determining the latter amount to be due and properly assessed. (R. 8.)

Upon the taxpayer's failure to pay, the Collector on August 5, 1926, made demand upon the surety for the amount for which the abatement claim was rejected, with interest, aggregating $14,555.89. The petitioner disputed liability in that amount and submitted to the Collector a draft to the order of the Collector for $8,223.67. (R. 9.) The draft, which was paid upon presentation, bore a notation upon its face as follows (R. 10C):

> In full settlement of all taxes assessed for the period of the calendar year 1917 and in full settlement of all liability under bond SX 81670, Walter Moore principal

On December 20, 1926, the Collector returned the bond for $38,000 to the surety with the statement that all liability under the bond was terminated. (R. 9.)

On September 20, 1932, the then Collector made demand upon the taxpayer for $4,119.98 of interest

on the additional income tax for 1917. The demand was returned "not found", and on September 23, 1932, the Collector made demand upon the surety for that amount. (R. 10.)

The surety refused to pay any amount (R. 10), and this action was thereafter commenced by the United States on April 27, 1935, against the surety (R. 1).

From the facts recited in the stipulation of facts the sum sued for may be computed as follows:

Unabated portion of the tax	$8,223.67
Interest at 6% per annum from May 6, 1920 (date of original demand on taxpayer) to February 18, 1925 (date claim in abatement rejected in part)	2,363.01
Interest from February 18, 1925 to December 17, 1926 (date of payment) at 12% per annum	1,806.06
Total	12,392.74
Amount paid	8,223.67
Balance paid	[1] $4,169.07

Both parties, on January 30, 1940, moved for summary judgment upon the complaint, answer and a stipulation of facts annexed to the Government's notice of motion. (R. 1, 11–12.)

The surety did not dispute that accrued interest on the tax, correctly computed to December 17, 1926, the day the surety paid the principal amount of the tax, was $4,169.07. The District Court gave the United States a judgment for that sum, but

[1] The computation of the larger sum of $4,932.86 in the complaint (R. 5) was made by applying an interest rate of 12% per annum for the period from May 6, 1920, to November 22, 1921, the day before enactment of the Revenue Act of 1921 which provided in Section 250 (e) (h) an interest rate of 6% per annum for taxes assessed under the 1917 and 1918 Revenue Acts. The amount of $4,119.98 demanded by the collector on September 23, 1932 (R. 10) apparently involved an erroneous computation.

refused to give interest at the legal rate of 6% per annum on the amount of $4,169.07. (R. 12–13.) Cross-appeals were taken (R. 15), and the Circuit Court of Appeals held that on the surety's appeal the judgment should be affirmed, and that on the appeal of the United States it should be modified to include interest at the rate of 6% per annum from December 17, 1926 (R. 20).

SUMMARY OF ARGUMENT

I

It is undisputed that the Collector had no express authority to cancel the bond and reliance is placed on implied authority. Both the limited function of collectors in respect of abatement claims and the applicable principle of law disclose the lack of any implied authority.

An examination of the statutes and regulations governing abatement claims, and security given therewith, discloses that the Commissioner alone had authority to determine such claims and that there was a consistent policy of requiring security for the tax pending the determination in all cases. Bonds given as security, although nominally running to the collector, were intended to protect the Government which obtained direct rights under them as the real party in interest. Nothing in the statutes, regulations, or administrative practice implies authority in the collector to release such rights of the United States.

Under our legal system all authority to bind the Government must be found in the Constitution or statutes. Public policy places any occasional loss on the individual who relies on unauthorized acts rather than on the public. Particularly in the case of subordinate officials, such as collectors, authority to release obligations of the United States should not be implied in the absence of a clear statutory basis which is not present here.

II

Interest at the legal rate of 6% per annum should have been allowed on $4,169.07 from December 17, 1926, when that sum was due under the bond, but unpaid.

A. Interest is due as a matter of law under the rule that sureties are liable for interest on amounts due on their bonds from the time they are notified and fail to pay. This is not a case of interest on interest, as the District Court thought, because the amount recovered on the bond is not recovered as interest on the tax but as a sum due on the obligation of the bond which is recognized to be distinct from the obligation of the tax.

B. Interest due as a matter of law should not be denied on the basis of equities of a particular case. Moreover, there are no such equities here. The surety had no right to contest the tax and it patently violated the terms of its bond in paying a sum less than was due. It is charged with knowledge that the Collector had no power to ac-

cept the payment in compromise or to discharge the Government's obligation on the bond.

ARGUMENT

I

THE COLLECTOR HAD NO AUTHORITY TO CANCEL THE BONDS AND THE UNITED STATES IS NOT BOUND BY HIS UNAUTHORIZED ACTS IN THAT RESPECT

The present proceeding was instituted by the United States against the petitioner on a bond, upon which the petitioner was surety, given to a Collector of Internal Revenue to secure the payment of income taxes, interest and penalties for the year 1917, pending consideration by the Commissioner of Internal Revenue of a claim in abatement. The Commissioner rejected the claim in abatement in part, and upon the taxpayer's failure to pay, demand was made on August 5, 1926, upon the petitioner for the amount for which the abatement claim was rejected, with interest. The petitioner paid only a portion of the sum demanded of it, but noted on the draft that the payment was in full settlement of all liability under the bond. The Collector of Internal Revenue thereafter returned the bond to the petitioner with the statement that all liability under the bond was terminated.

The authority of the Collector of Internal Revenue to accept the bond here in suit, and the right of the United States to sue upon the bond, are not questioned by the petitioner. The petitioner

also does not contest the fact that the sum of $4,169.07, here involved, was included in the amount demanded of it on August 5, 1926, and that it was then under an obligation to pay that sum to the United States and would still be under such obligation save for the action of the Collector on December 20, 1926, informing it that all liability under the bond was terminated. The principal question in the present case, therefore, is whether the statement of the Collector that all liability under the bond was terminated bars a recovery by the United States upon the bond. That question was determined adversely to the petitioner by the District Court and the Circuit Court of Appeals.

The petitioner's contention is that the authority of the Collector of Internal Revenue with respect to the collection of taxes is exclusive and supreme, that the Collector is not a subordinate official of the Government, and that since the Collector has implied authority to accept a bond, he is likewise invested with implied authority to discharge a surety from liability on a bond. The petitioner tacitly concedes that if a collector has no authority to discharge a surety, the United States would not be bound by any attempted exercise of such a power. The Government contends that the Collector lacked authority to discharge the bond involved here, and that his action in stating that the liability on the bond was

terminated was without legal effect upon the rights of the Government.

The Government submits that the Collector's complete lack of authority to discharge the bond is disclosed by an examination of the nature and scope of his functions generally and in respect of abatement claims.

It was the duty of the Collectors to collect all taxes imposed by law. Revised Statutes, Section 3183, *infra*, p. 30. However, general superintendence of the collection as well as the assessment of all taxes was by law vested in the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury. Revised Statutes, Section 321, *infra*, p. 29. Collectors are merely subordinate officers of the Treasury Department, and their functions are primarily ministerial. *Erskine* v. *Hohnbach*, 14 Wall. 613, 616; *Harding* v. *Woodcock*, 137 U. S. 43, 46; *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, 627; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 380–381.

Section 250 (b) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, in effect when the additional assessment for 1917 here involved was made in 1920, provided that if upon the Commissioner's examination of an income tax return the amount paid was insufficient, the difference should be paid on notice and demand by the Collector. The Commissioner made the additional assessment and advised the Collector, who then demanded payment within ten days. To avoid undue hardship, tax-

payers were allowed to file claims in abatement and delay collection until the Commissioner determined their claims. H. Rep. No. 2, 70th Cong., 1st Sess., p. 34 (1939–1 Cum. Bull. (Part 2) 384, conveniently quoted in *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 418–419).

Section 3220 of the Revised Statutes, as amended by Section 1316 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, *infra*, p. 31, authorized the Commissioner, subject to regulations prescribed by the Secretary of the Treasury, to remit taxes erroneously assessed. "Remit" includes "abate". *Sugar Run Coal Mining Co.* v. *United States*, 21 F. Supp. 10, 11 (E. D. Pa.). Section 250 (e) of the 1918 Act recognized the existence of the claim in abatement practice by the provision that if an overdue tax was the subject of a bona fide claim in abatement, the 6% rate of interest applied rather than the 12% rate, and the 5% addition to the tax. Section 234 (a) (14) (a) expressly provided for a claim in abatement with a surety bond satisfactory to the Commissioner in special cases where the taxpayer had suffered a substantial loss in value of inventory or by rebates. *United States* v. *John Barth Co.*, 279 U. S. 370. Section 250 (g) provided that the Commissioner might accept security approved by him to suspend collection of jeopardy assessments.

Treasury Regulations under the 1918 Act (Treasury Regulations 45, Article 1032; see also Treasury Regulations 14 (Revised), p. 14) regulated this

general practice of claims in abatement by providing the manner in which they should be prepared and submitted for the Commissioner's consideration. These regulations further provided that filing a claim in abatement did not suspend collection or relieve the collector from the duty of preventing collection being jeopardized. Article 268 of Treasury Regulations 45 made provision for handling surety bonds filed with statutory claims in abatement under Section 234 (a) (14) (a) of the 1918 Act, but apparently there was no specific provision for bonds filed with other abatement claims not provided for by specific statutory provisions but filed under authority of the general provisions (Revised Statutes, Section 3220 as amended), and the regulations and administrative practice.

Even in the absence of a specific statutory provision expressly authorizing abatement claims in all types of cases, these statutory provisions and the authorized regulations, which have the effect of statutory law, constituted legislative authorization or approval of the generally accepted claim in abatement procedure. *United States* v. *Wolper,* 86 F. (2d) 715 (C. C. A. 2d); *United States* v. *Converse Cooperage Co.,* 42 F. (2d) 227, 228 (N. D. Ill.). See also *Rock Island &c. R. R.* v. *United States,* 254 U. S. 141.[2]

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[2] Section 250 (a) and (f) of the Revenue Act of 1921, c. 136, 42 Stat. 227, in effect recognized and ratified the general abatement claim practice by changing it to the extent of pro-

An integral feature of the abatement claim procedure, as disclosed by all of the provisions with respect to abatement claims discussed above, was the requirement of surety bonds or other security to secure payment of the taxes pending suspension of collection until determination of the abatement claims. Such bonds were given "to protect the United States against loss", and were "intended to guarantee payment * * *". *Gulf States Steel Co.* v. *United States*, 287 U. S. 32, 43; *United States* v. *John Barth Co.*, 279 U. S. 370; *United States* v. *Oswego Falls Corp.*, 113 F. (2d) 322, 325 (C. C. A. 2d).

The Commissioner alone had authority to pass on abatement claims. The collectors had no authority in respect of them and merely exercised the ministerial duty of transmitting them to the Commissioner. In requiring security with these claims the collector's role was much the same. He merely carried out the policy that the Government should be protected against loss and collection should be secured pending the Commissioner's determination. Cf. O. D. 733, 3 Cum. Bull. 308 (1920), instructing collectors that where the prop-

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viding a hearing in the Bureau before an additional assessment and forbidding an abatement claim after determination upon such a hearing. See S. Rep. No. 275, 67th Cong., 1st Sess., pp. 20–21 (1939–1 Cum. Bull. (Part 2) 181). The Revenue Act of 1924, c. 234, 43 Stat. 253, which provided for determination of tax liability by the Board of Tax Appeals before additional assessment, under Section 279 (d) forbade claims in abatement except in jeopardy cases.

erty of a corporation is in the hands of a receiver who files a claim for abatement of an additional assessment of income and profits taxes for 1917, no bond should be required as security for the payment of such taxes, inasmuch as the Government was entitled to receive payment of the taxes in preference to the creditors of the corporation. See also I. T. 1869, II–2 Cum. Bull. 244 (1923), instructing collectors that where the taxpayer fails to furnish the bond requested upon the filing of an abatement claim and the collector proceeds to collect the tax as if no claim for abatement had been filed, he should return the abatement claim to the taxpayer and advise him of his remedy by a claim for refund.

The administrative policy and practice of the Bureau of Internal Revenue is further indicated by its ruling that a bond to secure an extension of time to pay the tax (in that case under Section 274 (k) of the Revenue Act of 1926, c. 27, 44 Stat. 9) cannot be returned and the surety released even where it has paid all the taxes and interest then requested, because there is no provision of law authorizing such release. G. C. M. 8980, X–1 Cum. Bull. 256 (1931).[3] This departmental rul-

[3] This ruling states in its pertinent part:

This office is of the opinion that, even where payments by a principal or a surety satisfy the liability under a bond, there is no provision of law authorizing the Commissioner or a collector to return the bond or to issue to a principal or surety a certificate of release therefrom, and that, accord-

ing relied on a series of opinions of the Attorney General expressing the long and consistently held view of the executive branch of the Government that, in the absence of statutory authority, there is no power to release a bond even where another is substituted. 33 Op. A. G. 441; 7 *id.* 62; 4 *id.* 312.

Theoretically, it might be suggested that collectors required bonds with abatement claims only in those cases where on the facts they thought collection jeopardized and in order to protect themselves from liability on their official bonds for failure to collect. It might be argued that in this manner collectors exercised independent discretion and authority in requiring bonds, and that such authority sufficiently implies authority to cancel such bonds. It is sufficient answer that in every case where the statute expressly provides for abatement claims, it expressly requires security in every case without regard for the taxpayer's solvency. This expressed statutory policy was also observed in practice even in cases of

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ingly, there is no authority for the execution of the form submitted by the surety in the instant case, purporting to release the surety from further liability under the bond furnished by it. (See 4 Op. Atty. Gen., 312; 7 Op. Atty. Gen., 62; 33 Op. Atty. Gen., 441.) The bond, therefore, should be retained in the files of the Bureau. However, if the Bureau is satisfied that the taxpayer and/or the surety in this case have paid the amounts of the tax and interest and/or penalty covered by the bond, in accordance with the terms of the extension granted, the collector or the Bureau may so advise the surety.

abatement claims not specifically mentioned in the statute. Thus the policy of protecting the Government against loss was observed by requiring security with all abatement claims.

But even if it were thought that the unlikely possibility of the Government asserting liability on his official bond was one important consideration in moving the collector, in his discretion, to require bonds with abatement claims, and was not merely collateral and incidental, certainly the principal purpose of such bonds was to protect the United States directly by giving it an action on the bonds and was not merely to give the collector a remedy if he were liable on his official bond. Indeed, it is settled, although corporate sureties contended to the contrary, that the United States obtained direct rights under these bonds, given nominally to collectors, and is the real party in interest and can sue upon them in its own name.[4] The making of the bond gives the United

[4] Sureties have unsuccessfully resisted recovery on such bonds on a variety of other grounds, such as that recovery of the tax was barred by limitations (*Gulf States Steel Co.* v. *United States*, 287 U. S. 32; *United States* v. *John Barth Co.*, 279 U. S. 370); lack of consideration (*United States* v. *Oswego Falls Corp.*, 113 F. (2d) 322 (C. C. A. 2d)); that the bonds was not authorized by statute (*Maryland Casualty Co.* v. *United States*, 87 F. (2d) 646 (C. C. A. 7th)); *United States* v. *Wolper*, 86 F. (2d) 715 (C. C. A. 2d)); *United States* v. *Fidelity & Deposit Co. of Maryland*, 80 F. (2d) 24 (C. C. A. 9th), certiorari denied, 298 U. S. 665; *United States* v. *Clark*, 3 F. Supp. 375 (W. D. Pa.); *United States* v. *Converse Cooperage Co.*, 42 F. (2d) 227 (N. D. Ill.)); that

States a "cause of action separate and distinct from an action to collect taxes which it already had". *United States* v. *John Barth Co.*, 279 U. S. 370, 375; *United States* v. *Oswego Falls Corp.*, 113 F. (2d) 322, 325 (C. C. A. 2d); *Hilton Lumber Co.* v. *Grissom*, 70 F. (2d) 892, 894 (C. C. A. 4th), certiorari denied, 293 U. S. 613; *United States* v. *Jureidini*, 35 F. (2d) 57 (S. D. N. Y.).

Clearly, the Collector had no express authority to release the Government's claim on the bond, and, we submit, no such authority is implied in view of the complete control of the Commissioner over abatement claims and the settled policy to require security with all cases which rendered the collectors' functions in actual practice substantially ministerial.

Moreover, the reasons of public policy for the rule that the Government is not bound by unauthorized acts of its agents requires that such authority in a subordinate official to surrender rights of the United States be clearly expressed in statute or regulation and forbids that it rest solely upon implication.

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the tax in question was not due (*Maryland Casualty Co.* v. *United States*, 87 F. (2d) 646 (C. C. A. 7th)); and that the abatement claim was never filed, or was filed too late (*Hughson* v. *United States*, 59 F. (2d) 17 (C. C. A. 9th); *Roberts Sash & Door Co.* v. *United States*, 38 F. (2d) 716 (C. Cls.), affirmed, 282 U. S. 812; *United States* v. *Massachusetts Bonding & Ins. Co.*, 60 F. (2d) 541 (S. D. N. Y.)). See generally annotation on bonds for payment of income tax. 117 A. L. R. 452.

The rule that the Government is not bound by the unauthorized acts of its agents is not a technical rule of tax law, but has been declared to be a basic principle inherent in the structure of our Government in which all authority to bind the Government must be found in its constitutional or statutory enactments. *The Floyd Acceptances*, 7 Wall. 666, 676–677. This principle is supported by the public policy which places occasional loss on an individual who relies on such unauthorized acts rather than upon the public at large represented by the Government. A different rule might encourage such unauthorized acts and might encourage reliance upon such acts from which the public could not easily protect itself. *Lee* v. *Munroe*, 7 Cranch 366, 369; cf. Story, Agency, Section 307 (a) (9th Ed.). This rule has been applied consistently, *Whiteside* v. *United States*, 93 U. S. 247, 256–257; *Hart* v. *United States*, 95 U. S. 316, 318 (action against surety on distiller's bond to recover loss caused by collector); *Hawkins* v. *United States*, 96 U. S. 689, 691; *Minturn* v. *United States*, 106 U. S. 437, 445 (action on surety bond to recover loss caused by collector); *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *Jeems Bayou Club* v. *United States*, 260 U. S. 561, 564; *Wilber Nat. Bank* v. *United States*, 294 U. S. 120, 123–124.

Under the accepted liberal rules of constitutional construction (*McCulloch* v. *Maryland*, 4 Wheat.

316, 407), a broad doctrine of implied authority might properly be applied to superior officers of the Government deriving their powers from necessarily general provisions found in the fundamental law. *The Floyd Acceptances,* 7 Wall. 666, 677. Such doctrine, however, should not be applied to subordinate Government officials with powers and duties prescribed and limited by specific laws. Their authority must be found in a statute either expressly or by inescapable implication, which is not present here. Certainly this is true where the implied authority claimed is to release a claim of the Government. And it seems clear that the effect of the petitioner's argument is that the Collector had authority to release or compromise the claim of the Government.

When the surety paid the Collector $8,223.67, there was also due on the bond $4,169.07. By the express terms of the bond the surety was obliged to pay tax and interest and, although it disputed the tax liability (R. 9), it had no standing to do so. *United States* v. *John Barth Co.,* 279 U. S. 370; *Bowers* v. *American Surety Co.,* 30 F. (2d) 244 (C. C. A. 2d), certiorari denied, 279 U. S. 865. The exact circumstances under which the surety paid only $8,223.67 by the draft dated December 17, 1926, to the order of the Collector "in full settlement of all liability" on the bond (R. 10C), are not known, but the most probable construction of the draft is that it was submitted in compromise. Immediately after the draft was paid, the Collector,

in his letter of December 20, 1926, returned the bond and stated all liability under it was terminated, but it had been the clear rule for years, and the surety must have known, that only the Commissioner, with the consent of the Secretary of the Treasury, and not the Collector, was authorized to make a compromise. Treasury Regulations 45, Article 1011 (1918 Revenue Act); *Botany Mills* v. *United States*, 278 U. S. 282, 288–289; *Leach* v. *Nichols*, 23 F. (2d) 275, 277 (C. C. A. 1st). The surety must have known, therefore, that it could not rely on the Collector's statement or upon return of the bond to extinguish the Government's rights. The law had long been settled that every surety is presumed to know that the Government is not bound by unauthorized acts of its agents. *Hart* v. *United States*, 95 U. S. 316, 318.

If the Collector was not authorized by law to release the rights of the United States on the bond, as the Government has contended, the United States is not bound by his unauthorized acts and the court below properly allowed recovery on the bond. *United States* v. *Globe Indemnity Co.*, 94 F. (2d) 576 (C. C. A. 2d), certiorari denied, 304 U. S. 575; *Elliot* v. *District of Columbia*, 10 D. C. 396; *People* v. *Brown*, 67 Ill. 435; cf. *Hart* v. *United States*, 95 U. S. 316, 318; *Ritter* v. *United States*, 28 F. (2d) 265 (C. C. A. 3d); *United States* v. *Roanoke Motor Co.*, 8 F. Supp. 228 (W. D. Va.).

The petitioner relies on *United States* v. *Alexander*, 110 U. S. 325; *Heinemann Chemical Co.* v.

United States, 92 F. (2d) 302 (C. C. A. 3d); *Brewerton* v. *United States,* 9 F. Supp. 503 (C. Cls.). In the *Alexander* case, *supra,* the Secretary of the Treasury abated internal revenue taxes on liquor destroyed by fire in a bonded warehouse, and the surety on the warehouse bond was so notified pursuant to statutory authority (c. 218, 17 Stat. 162), which provided that the Secretary might abate the taxes and expressly provided that he might cancel any warehouse bond. Thereafter the Secretary attempted to withdraw the abatement and suit was brought on the bond. The court held that there had been a cancellation of the bond under the statute which could not be construed to give him the unlimited power to withdraw the assessment and subject the principals and sureties to a new liability. The court stated that the tax must be reassessed and a new bond obtained. This case of attempted unauthorized revival of an obligation released by exercise of express statutory authority is, of course, different from the present situation. Indeed, it is authority for the Government's position insofar as it states the strict rule that acts of Government officers, to be effective, must be based on clear statutory authority.

In the *Heinemann* case, *supra,* upon denial of a statutory abatement claim filed under Section 214 (a) (12) (a) of the 1918 Act, the taxpayer paid the tax for 1918 without interest and the Collector accepted a bond for $10,000, which he thought

sufficient to secure the interest, in substitution for the original abatement bond of $46,350. The Circuit Court of Appeals for the Third Circuit, relying on the *Alexander* and *Brewerton* cases, *supra,* held that the Collector was authorized to release the first bond, reversed the judgment for the Government on the first bond (15 F. Supp. 365 [W. D. Pa.]), and granted a new trial.[5]

To the extent that the *Heinemann* case presents a view substantially opposed to the view of the court below, it is submitted that the view of the Circuit Court of Appeals for the Third Circuit at that time mistakenly applies the Alexander decision, and the only other decision it cites, *Brewerton* v. *United States, supra,* also mistakenly applies the *Alexander* decision.[6]

It is submitted, therefore, that the Collector was authorized to release the surety's obligation to the United States only if such authority can be found in the statutes and regulations defining his powers and duties; that nothing in the provisions regulating abatement claims and bonds given therewith, or in the general statutory provisions in respect

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[5] The record before the court had left unsettled the question of fact whether the Commissioner had instructed the Collector not to release the first bond until further instructions.

[6] In the *Brewerton* case the taxpayer sued to recover a tax paid after the statute of limitations had run and the Government's affirmative defense that the amount sued for was due to the Government on the abatement bond was rejected on the ground that the Collector released the bond.

of collectors, expresses such authority or fairly implies it; that, therefore, the Collector's acts were unauthorized; that the surety must have known, and is deemed to have known, this when it paid part of the sum demanded and obtained the physical return of its bond; and that in such a case the law is clear that the United States is not bound by the Collector's unauthorized acts in declaring that no further liability existed either for the tax or on the bond, and upon that basis returning the bond.

Finally, the proper remedy for lack of express authority to release these surety bonds given for protection of the Government, if any remedy is needed now after elimination of the general abatement claim procedure, is legislation either conferring such authority expressly on chosen officials or providing a period of limitations for suits on such bonds. It is submitted that the proper remedy is not a judicial determination that subordinate officials such as collectors have such authority even in the absence of any regulations of their superiors controlling its exercise.

II

INTEREST OF 6% PER ANNUM IS DUE ON $4,169.07 FROM DECEMBER 17, 1926, THE DATE OF PAYMENT OF $8,223.67

Interest on the additional tax of $8,223.67 has been computed without disagreement to be $4,169.07 up to December 17, 1926, when the surety paid an amount equal to the additional tax but

refused to pay a further sum equivalent to the interest.[7]

The District Court held that as a matter of law the Government was not entitled to interest on the interest item of $4,169.07 in the absence of agreement or statute and, moreover, that as a matter of equity, interest would be inequitable in view of the Collector's statement that there was no liability on the bond and in view of the delay in commencing this action. (R. 13.) The Circuit Court of Appeals reversed the District Court upon this point, holding that the Government's claim was not one for interest upon interest, but a claim for breach of contract which normally carries interest. The court below further held that in the circumstances of the present case it was not inequitable to charge the surety with interest. (R. 19.) We submit that this holding of the court below is correct.

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[7] If the payment of $8,223.67 was not made in compromise of the entire claim it might have been applied, following usual commercial practice, first to the interest of $4,169.07 which was due, leaving $4,054.60 ($8,223.67 minus $4,169.07) of the principal of the tax unpaid and mandatory statutory interest under the revenue acts (12% part of the time) would have continued to accrue up to the present time. But the practice of the Bureau, contrary to commercial practice, is to apply payments first to the tax, and this case has proceeded on the theory that this was done and that interest was left unpaid. This fact, that the Government might have pursued the other alternative and might have demanded more interest at the tax rate than is now demanded, is pertinent to a discussion of the question whether the interest demanded is equitable.

A. THE LAW REQUIRES INTEREST

The surety in its bond expressly undertook to pay any additional tax with interest. (R. 10B.) If it had paid neither the tax nor interest, it is clear that it would have been liable at least for the taxes and statutory interest provided by the revenue acts up to the penal sum of the bond, and for a further sum of interest even beyond the penal sum of the bond at the ordinary legal rate for any additional period of its failure to pay after demand. *Massachusetts Bonding & Ins. Co.* v. *United States,* 97 F. (2d) 879 (C. C. A. 9th); *United States* v. *Wagner,* 93 F. (2d) 77 (C. C. A. 9th); *United States* v. *Rigali,* 90 F. (2d) 929 (C. C. A. 9th); *United States* v. *Hamilton,* 96 F. (2d) 878 (C. C. A. 7th); *Maryland Casualty Co.* v. *United States,* 87 F. (2d) 646 (C. C. A. 7th); *Maryland Casualty Co.* v. *United States,* 76 F. (2d) 626 (C. C. A. 5th); see *United States* v. *United States Fidelity & Guaranty Co.,* 236 U. S. 512, 528. The applicable legal rate is 6% per annum (New York General Business Law, Section 370).

When the surety in effect refused to pay the amount of $4,169.07 on December 17, 1926, it clearly violated an express condition of its bond and became liable to pay that amount not as interest on the tax but as an equivalent contractual amount due on its bond. Liability for interest on that amount is implied by the nature of the surety's promise, becomes part of the debt, and is due as a matter of right.

If the United States was suing the taxpayer directly for interest on the cause of action for taxes, and was not suing the surety on the separate contractual obligation of the bond, the question of interest on interest would arise. But it is settled that the abatement bond gives the United States "a cause of action separate and distinct from an action to collect taxes", so that even if the tax action is barred completely, recovery may be had on the bond. *United States* v. *John Barth Co.*, 279 U. S. 370, 375; *Gulf States Steel Co.* v. *United States*, 287 U. S. 32, 44. If complete extinguishment of the entire tax cause of action does not affect the action on the bond then, *a fortiori*, the fact that the incidental or supplementary right of interest on interest might be denied in a suit on the tax cause of action does not permit the denial of legal interest on the amount recoverable on the bond which is not interest, but a sum in lieu of interest which the surety has contracted to pay. The courts, applying the *Barth* decision, *supra*, have allowed interest at the legal rate upon these abatement bonds against sureties, under the settled rule that sureties are liable for such interest after they fail to pay upon demand. *Massachusetts Bonding & Ins. Co.* v. *United States, supra; United States* v. *Hamilton, supra.* Consequently, under the same rule, interest at the legal rate is due.

The rule stated by the District Court (R. 13) has no application because, as has been stated, this is

not a case of interest on interest, but interest on a sum due under the separate obligation of the bond. Moreover, the rule of no interest upon interest is applied, when it is applied, in connection with the rule that a partial payment is applied first to interest and then to principal with interest continuing to accrue on the amount unpaid until final payment. *Story* v. *Livingston,* 13 Pet. 359; *Young* v. *Hill,* 67 N. Y. 162, 167; *State of Connecticut* v. *Jackson,* 1 Johns. Ch. 13 (N. Y.). That rule has no application here where the surety's partial payment was applied not to interest but to principal. No interest would accrue at all on the amount remaining unpaid after applying a partial payment to principal unless interest be allowed on this unpaid sum which is now due on the bond in lieu of interest on the tax due from the taxpayer. The purpose of the bond is to give the Government the equivalent of the tax and all interest and this purpose can be achieved only by approving the allowance of interest made by the court below.

B. IN THE CIRCUMSTANCES INTEREST IS NOT INEQUITABLE

The District Court stated that interest would be inequitable in view of the Collector's action in returning the bond and the delay in the institution of this action, citing *Board of Comm'rs* v. *United States,* 308 U. S. 343, 350, 352. (R. 13.) It is true that when, as in that case, the federal court is engaged for the first time in determining which rule of interest shall be adopted, as the new

federal rule, general notions of equity will be considered in fashioning the applicable rule. But when the applicable legal rule is formulated and fixed, and it is not denied that 6% interest is due unless barred on the equitable ground of laches, it is submitted that equitable considerations of a particular case should not determine the allowance of legal interest.

Moreover, even if the courts were disposed to grant or withhold legal interest for breach of a contract according to their notions of the particular equities, it is submitted that legal interest is not inequitable in this case. The surety had no right to contest the tax and it clearly breached its bond when it offered to pay and paid less than the tax and the tax interest. *United States* v. *John Barth Co., supra.* It must have known, and is deemed to have known, that the Collector was not empowered to accept this payment in compromise. It is charged with knowledge that the Collector was not authorized to relinquish the Government's rights on the surety's bond. There is no showing upon the present record when the superior officers of the Government were informed of the petitioner's failure to comply with the demand made upon it on August 5, 1926, to fulfill its obligation under the bond. During the entire period from the original demand the petitioner has had the use of the money in respect of which it had no proper basis to believe it was not under the duty to pay to the Government.

Decisions relied on by the petitioner (Br. 24), such as *United States* v. *Sanborn*, 135 U. S. 271, 281, denying the Government interest, not claimed pursuant to contract, on the equitable ground of laches of the Government's agents, are based on facts wholly different from the circumstances here and involving different equitable considerations. If interest is not due here contractually as a matter of right, as the Government contends, but is to be decided on the equities, it is submitted that the facts disclose that the equities favor the Government.

Moreover, even if interest be not allowed from December 17, 1926, it should be allowed from September 23, 1932, when the Collector demanded that the surety pay the amount still due (R. 10).

CONCLUSION

The judgment of the court below is correct and should be affirmed.

Respectfully submitted.

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APPENDIX

Revised Statutes:

SEC. 321. The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue; * * *. (U. S. C., Title 26, Secs. 1691, 1701.)

SEC. 3182. The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this Title, or accruing under any former internal-revenue act, where such taxes have not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified. Whenever it is ascertained that any list which has been or shall be delivered to any collector, is imperfect or incomplete in consequence of the omission of the name of any person liable to tax, or in consequence of any omission, or understatement, or undervaluation, or false or fraud-

ulent statement contained in any return made by any person liable to tax, the Commissioner of Internal Revenue may, at any time within fifteen months from the time of the delivery of the list to the collector as aforesaid, enter on any monthly or special list the name of such person so omitted, together with the amount of tax for which he may have been or shall become liable, and also the name of any such person in respect to whose return, as aforesaid, there has been or shall be any omission, undervaluation, understatement, or false or fraudulent statement, together with the amount for which such person may be liable, above the amount for which he may have been or shall be assessed upon any return made as aforesaid; and he shall certify and return such list to the collector as required by law. And all provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings herein authorized and directed. (U. S. C., Title 26, Secs. 1530, 1531, 1532, 1533.)

SEC. 3183. It shall be the duty of the collectors, or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated. And every collector and deputy collector shall give receipts for all sums collected by him. (U. S. C., Title 26, Secs. 1541, 1549.)

SEC. 3214. No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings: *Provided,* That in case of any suit for penalties or forfeitures brought

upon information received from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit. (U. S. C., Title 26, Secs. 1640, 1645.)

SEC. 3220 (as amended by Section 1316 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057). The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section. (U. S. C., Title 26, Sec. 1670.)

SEC. 3229. The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced.

> Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise. (U. S. C., Title 26, Sec. 1661.)

Treasury Regulations 45 (1920 Ed.) provide:

> ART. 1032. *Claims for abatement of taxes erroneously assessed.*—Claims by the taxpayer for the abatement of taxes or penalties erroneously or illegally assessed or abatable under remedial acts shall be made on form 47 (revised). They must be sustained by the affidavits of the parties against whom the taxes were assessed, or of other parties cognizant of the facts. When a tax has been assessed and turned over to the collector, the presumption is that the assessment is correct. The burden of proof in rebutting the presumption and showing that it was improperly or illegally assessed, or that relief should be given under a remedial statute, rests upon the applicant for abatement. The affidavits must therefore contain full and explicit statements of all the material facts relating to the claim in support of which they are offered and to the proper consideration of which they are essential. The legality of the claim is to be determined by the Commissioner upon the facts presented by the affidavits. The filing of a claim for abatement does

not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund. See further Regulations No. 14 (revised). A collector may himself present once a month a blanket claim on form 47 (revised) for the abatement of taxes coming within certain classes of taxes erroneously assessed.

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SUPREME COURT OF THE UNITED STATES.

No. 817.—October Term, 1940.

The Royal Indemnity Company, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 26, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

A collector of internal revenue, who had accepted a surety bond filed with him by a taxpayer to accompany his claim for abatement of income tax, consented to termination of all liability upon the bond and surrendered it before its obligation was fully satisfied. The questions for decision are whether the collector had power to release the obligation of the bond and, if not, whether the United States is entitled to interest on the amount of its claim against the surety.

Upon the Commissioner's assessment in 1920 of additional income taxes in the sum of $29,128, asserted to be due from the taxpayer for 1917, the taxpayer filed a claim for abatement of the assessment, and to secure suspension of collection of the tax, executed a bond to the collector in the sum of $38,000 with petitioner as surety, conditioned upon payment on May 2, 1923, of the tax with interest. The Commissioner allowed the claim in abatement in part but rejected it to the extent of $8,223.38, on which interest had then accrued in the sum of $4,169.07. On demand of the Commissioner on August 5, 1926, for the principal amount of the tax with interest to the date of demand, petitioner paid only the principal amount of the tax to the collector by draft of December 17, 1926, bearing the notation on its face that it was in full payment of the tax and of all liability on the bond. The collector collected the draft and surrendered the bond to petitioner with the statement that all liability on it had terminated.

In the present suit on the bond the District Court held that the collector was without authority to release the bond and gave judgment for the sum of $4,169.07 found by the Commissioner to be the interest on the unpaid tax to the date of the rejection of the

claim for its abatement, but refused to allow interest accruing subsequent to that date. On appeal the Circuit Court of Appeals ruled that under § 370 of the New York General Business Law, interest at six per cent. should be added to the unpaid balance found to be due on the bond and modified the judgment accordingly. 116 F. (2d) 247. We granted certiorari April 7, 1941, because of the importance of the questions presented, and of a conflict of the decision below with that of the Circuit Court of Appeals for the Third Circuit in *Heinemann Chemical Co.* v. *United States,* 92 F. (2d) 302.

It is not denied that the collector had authority to accept the bond, that it created a new cause of action distinct from that on the taxpayer's obligation, and that if it has not been released, the United States has authority to sue upon it, see *United States* v. *John Barth Co.,* 279 U. S. 370; *Gulf States Steel Co.* v. *United States,* 287 U. S. 32; *United States* v. *Wolper,* 86 F. (2d) 715; *United States* v. *Oswego Falls Corp.,* 113 F. (2d) 322. And it is conceded that, as the bond was conditioned on the payment of the taxes with interest, petitioner is indebted to the Government upon it for the amount of the interest which had accrued at the time of the rejection of the claim in abatement. See *Botany Worsted Mills* v. *United States,* 278 U. S. 282; *Hughson* v. *United States,* 59 F. (2d) 17, 19; *United States* v. *Steinberg,* 100 F. (2d) 124, 126. Respondent's contentions are that the balance of interest then due was released by the collector and that in any case it was not bound to pay interest on that balance.

Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted. *Whiteside* v. *United States,* 93 U. S. 247, 256-257; *Hart* v. *United States,* 95 U. S. 316, 318; *Hawkins* v. *United States,* 96 U. S. 689, 691; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Wilber Nat. Bank* v. *United States,* 294 U. S. 120, 123-124; cf. *United States* v. *Shaw,* 309 U. S. 495, 501; *Ritter* v. *United States,* 28 F. (2d) 265; *United States* v. *Globe Indemnity Co.,* 94 F. (2d) 576. Collectors of internal revenue are subordinate officers charged with the ministerial duty of collecting the taxes. R. S. § 3183, *Erskine* v. *Hohnbach,* 14 Wall. 613, 616; *Hardy* v. *Woodcock,* 137 U. S. 43, 46; *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373,

380, 381. There is no statute in terms authorizing them to remit taxes, to pass upon the claims for abatement of taxes or to release any obligation for their payment. Only the Commissioner, with the consent of the Secretary of the Treasury, is authorized to compromise a tax deficiency for a sum less than the amount lawfully due. R. S. §§ 3220, 3229, 26 U. S. C. 1661; 45 T. R., Art. 1011 (1918 Act); *Botany Worsted Mills* v. *United States, supra,* 288; *Loewy & Sons* v. *Commissioner,* 31 F. (2d) 652, 654.

There is thus no basis in the statutes of the United States for implying an authority in a collector to release a bond for the payment of the tax which the Commissioner alone is permitted to reduce by way of compromise when the Secretary of the Treasury consents. *Heinemann Chemical Co.* v. *United States, supra,* and *Brewerton* v. *United States,* 9 F. Supp. 503, to the contrary, plainly rest upon a misapplication of the ruling in *United States* v. *Alexander,* 110 U. S. 325, which sustained the release of a bond for taxes by the Secretary of the Treasury which had been specifically authorized by an Act of Congress.

The District Court rejected the Government's claim for interest upon the balance found due upon the bond as a demand for interest on interest which has generally been held not to be an appropriate measure of damages for the delayed payment of interest alone. See *Cherokee Nation* v. *United States,* 270 U. S. 476, 490. In any case it thought that the allowance of interest would be inequitable because of the collector's return of the bond to petitioner and the Government's delay in bringing the suit. But, as the Court of Appeals held, the obligation of petitioner to pay the interest accrued on the principal amount of tax under the applicable provisions of the Revenue Act was not damage assessed against petitioner for its non-payment of interest. Petitioner's obligation was contractual to pay an amount found to be due from the taxpayer and the suit against it is for a debt *ex contractu,* due and owing in conformity to the terms of the bond. See *United States* v. *John Barth Co., supra; Gulf States Steel Co.* v. *United States, supra.*

A suit upon a contractual obligation to pay money at a fixed or ascertainable time is a suit to recover damage for its breach, including both the principal amount and interest by way of damage for delay in payment of the principal, after the due date. And in the absence of any controlling statutory regulation the trial court is as competent to determine the amount of interest for delay as any other item of damage. *United States* v. *United States Fidelity*

Co., 236 U. S. 512, 528; *Young* v. *Godbe*, 15 Wall. 562, 565; *Maryland Casualty Co.* v. *United States*, 76 F. (2d) 626; *United States* v. *Wagner*, 93 F. (2d) 77; *United States* v. *Hamilton*, 96 F. (2d) 878; *Massachusetts Bonding & Ins. Co.* v. *United States*, 97 F. (2d) 879, 881.

But the rule governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute or local common law. In the absence of an applicable federal statute it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due. *Board of Commissioners, Jackson County* v. *United States*, 308 U. S. 343, 350, 352; *Young* v. *Godbe, supra*, 565; cf. *Billings* v. *United States*, 232 U. S. 261, 284, *et seq.*

The present suit is at law for the recovery of an amount due and owing which petitioner has contracted to pay. To such a case equitable rules relating to interest recoverable in suits for an accounting, or for the recovery of quasi contractual obligations arising from payment of money by mistake, are inapplicable. *United States* v. *United States Fidelity Co., supra*, 528; cf. *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174, 176; *United States* v. *Sanborn*, 135 U. S. 271, 281; *Redfield* v. *Bartels*, 139 U. S. 694, 702. Here responsibility for delay in payment rests quite as much upon the debtor, who is chargeable with knowledge of its own obligation and the breach of it, as upon the creditor. And in the meantime the debtor has had the use of the money, of which its default has deprived the creditor. Interest upon the principal sum from the date of default, at a fair rate, is therefore an appropriate measure of damage for the delay in payment. *United States* v. *United States Fidelity Co., supra*, 528; *Massachusetts Bonding & Insurance Co., supra*; *United States* v. *Wagner, supra*; *Maryland Casualty Co.* v. *United States, supra*. While the New York statute fixing the rate of interest is not controlling, the allowance of interest does not conflict with any state or federal policy and we think that in the circumstances of this case a suitable rate is that prevailing in the state where the obligation was given and to be performed. See *Young* v. *Godbe, supra*, 565; *Board of Commissioners, Jackson County* v. *United States, supra*, 352.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 817.—October Term, 1940.

The Royal Indemnity Company, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 26, 1941.]

Mr. Justice Black, dissenting.

I agree with the Court's judgment that the Collector of Internal Revenue did not have power to release a taxpayer from his obligation to pay, but I am unable to agree with the Court's conclusions on the question of interest. The contract on which the Government's suit rests contained no provision for interest. The state's interest law, according to the holding of the Court, is not controlling. Congress has enacted no law requiring payment of interest and fixing an interest rate on contracts guaranteeing tax payments. Nevertheless, this Court now requires that interest be paid—a judicial requirement which under similar circumstances has been frankly described as "judicial law-making". *Board of County Commissioners* v. *United States*, 308 U. S. 343, 350.

Were the question an open one, I would be reluctant to acquiesce in holding that federal courts, in the absence of statutes, could or should assume the power to fix interest in such a case. But, granting that we have the power to take this step, the rate of interest to be charged is from necessity an element of the legislative and policy power thus exercised, and that rate must therefore be determined by the Court. The rate fixed in this case is 6%. Resolution as to the amount is rested in part at least on New York's legislative rate. The inference is that a different rate might apply to contracts guaranteeing tax payments made in other states. For it is well known that interest rates fixed by state legislatures are not uniform but vary in amount.

Since in prescribing interest and fixing an interest rate we are passing upon questions of public policy, not marked at all by definite legislative boundaries, I find it difficult to agree to the

result here for two reasons: (1) Unless the rate fixed is to be considered in the nature of a penalty, 6% seems very high. A smaller rate would appear to come nearer to harmonizing with fair and equitable interest exactions. (2) I am of opinion that since our "judicial law-making" is and must be national in its scope, the law which we adopt fixing a rate of interest for transactions such as that here involved should operate with uniformity throughout the nation. Federal taxpayers or their sureties should not be required to pay 6% in one state, 4% in a second, and 10% in a third. Such varying rates are not subject to criticism by federal courts if they govern local intrastate transactions subject to state law. But it seems to me that federal taxpayers and their sureties should be subject to the same interest rate without regard to the state rates governing purely local transactions within a particular area in which federal taxpayers happen to reside. To the extent that the Court's opinion indicates the possibility of such a variance among the states, I am compelled to disagree.

Mr. Justice DOUGLAS and Mr. Justice MURPHY concur in this opinion.

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